ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1230

Consolidated with Nos. 19-1239, -1241, -1242, -1243, -1245, -1246, and -1249

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNION OF CONCERNED SCIENTISTS et al.,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,

Respondent,

ASSOCIATION OF GLOBAL AUTOMAKERS, INC., et al.,

Intervenors for Respondent,

STATE OF OHIO et al.,

Movant-Intervenors for Respondent.

REPLY OF PUBLIC-INTEREST PETITIONERS IN SUPPORT OF MOTION FOR ABEYANCE

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INTRODUCTION

All parties agree that because EPA took final action premised on a final action of NHTSA, both agencies' actions ultimately should be reviewed together on the merits. The parties differ on how to achieve that end in a timely and efficient manner.

This Court indisputably has jurisdiction to review EPA's actions directly. But Congress has strictly limited this Court's direct-review jurisdiction over NHTSA's actions. NHTSA's Preemption Rule falls outside those limits and therefore is subject to APA review in district court. The district court is now reviewing NHTSA's action in an earlier-filed proceeding involving almost all the parties here. Once that proceeding concludes, this Court can review EPA's actions directly alongside appeals from the district court. Thus, Public-Interest Petitioners have moved this Court to hold these petitions in abeyance pending the district court's review of NHTSA's action.

The Agencies and CSAR maintain that the district court cannot review NHTSA's action. The dispute over which court has jurisdiction to review that action in the first instance has been fully briefed to the district court on the Agencies' and CSAR's motions to dismiss. Yet those same parties now urge this Court to assume without deciding that they will prevail in that dispute, and to order immediate briefing on the merits of NHTSA's and EPA's actions in this Court before the district court rules on jurisdiction.

Whether this Court has jurisdiction to review NHTSA's action directly is, at a minimum, in "serious doubt." *Basardh v. Gates*, 545 F.3d 1068, 1070 (D.C. Cir. 2008). That doubt justifies holding these cases in abeyance pending the parallel district-court

proceeding. *See ibid.* Otherwise, this Court may determine, only after full merits briefing and argument, that it lacks jurisdiction to review NHTSA's action directly and thus cannot resolve challenges to that action or to EPA's derivative action. That determination would require this Court to return a crucial piece of this litigation to the district court and put the parties back where they stand today.

The better course is to hold these petitions in abeyance until the district court enters an appealable order on jurisdiction and/or the merits. This Court can then review that order and decide, with the benefit of the district court's reasoning, the appropriate next steps. The Agencies and CSAR will not suffer hardship in the interim.

ARGUMENT

This Court "may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same." *Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937). Whereas the Court expedites consideration "very rarely," D.C. Cir. Handbook of Practice and Internal Procedures 34 (Dec. 2019), it "often" holds petitions in abeyance "in light of other pending proceedings that may affect the outcome," *Basardh*, 545 F.3d at 1069. Here, the balance of "interests in judicial economy and any possible hardship to the parties," CSAR Opp. to Mots. for Abeyance (CSAR Opp.) at 8, tips sharply in favor of abeyance.

I. Judicial Economy Strongly Favors Abeyance.

A. This Court should review NHTSA's and EPA's final actions together.

EPA predicated its Waiver Revocation on two grounds: (1) NHTSA's Preemption Rule, and (2) in the alternative, a novel interpretation of the Clean Air Act. *See* Mot. of Public-Interest Petrs. for Abeyance (PIP Mot.) at 7–8. The Agencies now appear to represent that EPA relied on the first ground (the Preemption Rule) to revoke California's waiver for model years that were not affected by EPA's second, alternative ground. Agencies' Opp. to Mots. for Abeyance (U.S. Opp.) at 10–11. If that is true, then at least some portion of EPA's Waiver Revocation is predicated solely on NHTSA's Preemption Rule, which means that this Court cannot uphold EPA's action in its entirety without first upholding NHTSA's action.

It therefore makes no sense for this Court to review EPA's Waiver Revocation unless and until it has jurisdiction to review NHTSA's Preemption Rule. And no one argues that this Court should review EPA's Waiver Revocation and Section 177 Determination separately. In short, all parties agree that this Court ultimately should consider the merits of both agencies' final actions together. *See* U.S. Opp. at 2; CSAR Opp. at 13–14. The question is how this Court can do so efficiently within the constraint that it "simply is not at liberty to displace, or to improve upon, the jurisdictional choices of Congress—no matter how compelling the policy reasons for doing so." *Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 724 (D.C. Cir. 2016) (quotations omitted).

B. There is, at a minimum, serious doubt that this Court has jurisdiction to review NHTSA's action directly.

Absent full briefing on the issue, this Court should not undertake to decide now whether it has direct-review jurisdiction over NHTSA's Preemption Rule. *See* PIP Mot. at 13. No party asks the Court to do so. *Cf.* U.S. Opp. at 2 (advocating resolution of jurisdiction concurrent with merits review). Public-Interest Petitioners raise the issue here only to show that this Court's jurisdiction is, at least, in "serious doubt." *Basardh*, 545 F.3d at 1070. That doubt informs the proper approach to resolving these petitions.

The Agencies have offered shifting rationales for why this Court may review NHTSA's Preemption Rule directly. The regulatory preamble to that rule cites only the Clean Air Act's direct-review provision, Final Rule, 84 Fed. Reg. at 51,361, which addresses only "final action taken[] by [EPA's] Administrator," 42 U.S.C. § 7607(b)(1). But neither the Agencies nor CSAR argue to this Court that the Clean Air Act confers jurisdiction to review NHTSA's action.

Their new theory, based on the Energy Policy and Conservation Act, fares no better. That statute authorizes courts of appeals to directly review regulations prescribed pursuant to six specified sections of its fuel-economy chapter. 49 U.S.C. § 32909(a) (Section 32909). Absent from that list is the Act's discrete preemption section, which NHTSA's Preemption Rule purports to interpret and apply. *Ibid.*; *see id.* § 32919. Thus, as the Supreme Court recently explained when applying an analogous direct-review provision in *National Association of Manufacturers v. Department of Defense* (*NAM*), NHTSA's

Preemption Rule "falls outside the ambit" of Section 32909, "and any challenges to the Rule therefore must be filed in federal district courts." 138 S. Ct. 617, 624 (2018).

The contrary arguments of the Agencies (Opp. at 15–21) and CSAR (Opp. at 9–12) overlook several important considerations, a few of which we mention here.

First, the Agencies' expansive construction would render parts of Section 32909 superfluous. As in *NAM*, Congress "carefully enumerated" six sections of the Energy Policy and Conservation Act for direct review and omitted more than a dozen others, leaving challenges to rules issued pursuant to those other sections "to the jurisdiction of the federal district courts." 138 S. Ct. at 634. If NHTSA's Preemption Rule could be viewed as generally "carrying out" one of the enumerated statutory sections governing national fuel-economy standards, *see* U.S. Opp. at 16–19; CSAR Opp. at 11, then so could any regulation prescribed under the Act's fuel-economy chapter, which would render Congress's enumeration of some (but not all) of the chapter's sections superfluous. "Courts are required to give effect to Congress' express inclusions and exclusions, not disregard them." *NAM*, 138 S. Ct. at 631.

Second, the Agencies and CSAR argue that Section 32909 is a "far broader judicial review provision" than those at issue in *NAM* and similar cases because it applies to regulations prescribed in "carrying out" the specified sections, as opposed to regulations prescribed "under" those sections. CSAR Opp. at 10; *see also* U.S. Opp. at 15–16, 20. But this Court has equated "carrying out" in Section 32909 with "under." The Agencies and CSAR fail to mention *Delta Construction Co. v. EPA*, where this Court applied a

"straightforward reading of" Section 32909 to hold that courts of appeals may directly review only regulations prescribed "*under* the provisions enumerated." 783 F.3d 1291, 1299 (D.C. Cir. 2015) (emphasis added). The Agencies' present claim that Section 32909 "expansively provides for jurisdiction" and "is not limited to particular, discrete agency actions," U.S. Opp. at 20, runs afoul of their winning argument in *Delta Construction* that this "limited grant of jurisdiction … single[s] out only a narrow category of agency regulatory actions for direct appellate review," Resps. Br. at 54, *Delta Constr.*, 783 F.3d 1291 (Nov. 24, 2014).

In fact, the legislation adopting Section 32909's current wording provides unambiguously that a regulation "prescribed in carrying out" a specific section of the Act is nothing other than a regulation "prescribed under" that section. *Compare* Energy Policy and Conservation Act, Pub. L. No. 94-163, sec. 301, § 504(a), 89 Stat. 871, 908 (1975) (codified originally at 15 U.S.C. § 2004(a)) (conferring jurisdiction over regulations "prescribed under" specified sections), *with* Revision of Title 49, U.S. Code Annotated, "Transportation," Pub. L. No. 103-272, § 1(e), 108 Stat. 745, 1070 (1994) (codified at 49 U.S.C. § 32909(a)(1)) (conferring jurisdiction over regulations "prescribed in carrying out" specified sections), *and id.* §§ 1(a), 6(a), 108 Stat. at 745, 1378 (stating that Congress's 1994 recodification and revision of Title 49 were "without substantive change").

Third, the Agencies and CSAR notably ignore the Act's preemption section, 49 U.S.C. § 32919, when discussing statutory authority for the Preemption Rule. In the rule's preamble, however, NHTSA asserted that its rulemaking authority "encompasses

[the Act's] preemption provision"; that this provision "is clear on the question of preemption"; and that "NHTSA must carry *it* out." 84 Fed. Reg. at 51,320 (emphasis added). Indeed, the regulatory text codified by the agency recites the entire preemption section verbatim, twice. *Id.* at 51,361–62 (codified at 40 C.F.R. §§ 531.7, 533.7). Yet CSAR never mentions the preemption section, and the Agencies' argument refers to it only in a parenthetical that describes the Preemption Rule as "clarifying the preemptive effect of its standards consistent with the express preemption provision in 49 U.S.C. 32919." U.S. Opp. at 19 (quoting Final Rule, 84 Fed. Reg. at 51,325). That description leaves no doubt that NHTSA's action aims to "carry out" the preemption section, which "is not among" the sections designated for direct review. *Loan Syndications*, 818 F.3d at 718.

These are just some of the problems with the Agencies' and CSAR's position on a jurisdictional issue that has not been fully briefed here. These considerations create, at a minimum, serious doubt that NHTSA's Preemption Rule was colorably authorized by any of the specific sections of the Energy Policy and Conservation Act that Congress singled out for direct review. NHTSA's mere "invocation" of those other sections of the Act as purported authority for the Preemption Rule "does not control" this Court's subject-matter jurisdiction. *NAM*, 138 S. Ct. at 630 n.8; *see also* PIP Mot. at 12 n.4.

C. Merits briefing at this time would be inexpedient.

This Court should issue "an order holding [these] case[s] in abeyance" pending resolution of the parallel district-court proceeding, which "raise[s] common issues" and "may affect the outcome" here. *Basardh*, 545 F.3d at 1069. Such an order is appropriate

particularly because the "intensely disputed" issue of jurisdiction to review NHTSA's Preemption Rule, CSAR Opp. at 9, is briefed and awaiting argument in the district court. *See* Minute Order, *California v. Chao*, D.D.C. No. 1:19-cv-02826-KBJ (Jan. 15, 2020).

The Agencies and CSAR maintain that this Court should disregard the district court's in-progress consideration of the jurisdictional issue, immediately order merits briefing and schedule oral argument, and only *later* "resolve th[e] jurisdictional questions while it simultaneously reviews the merits of EPA's portion of the [Final Rule]." U.S. Opp. at 2; *see also* CSAR Opp. at 12–13. But the Agencies and CSAR do not even try to explain how that course could possibly promote judicial economy, or be in any party's interest, if this Court lacks jurisdiction to review NHTSA's action directly.

Serious doubt as to this Court's jurisdiction means there is a serious risk that the Court ultimately would conclude that it lacks jurisdiction to review NHTSA's Preemption Rule directly. Upon reaching that conclusion, this Court would need to await the district court's review and further briefing on appeal before disposing of these petitions on the merits. In short, the Court would have to return the litigation to where it stands today, with everyone involved having expended considerable resources in the interim.

That serious risk is not worth taking given that this Court can hold the petitions in abeyance until the district court finishes reviewing NHTSA's action. When that court enters a final judgment, it is nearly certain to be appealed to this Court. This Court can then resolve the petitions efficiently, without any question about its jurisdiction, and with the benefit of the district court's reasoning. At the very least, this Court should await

the district court's disposition of the jurisdictional issue pending before that court and any appealable order that may flow from that disposition. *See* 28 U.S.C. §§ 1291, 1292(b).

The Agencies protest (Opp. at 15) that "this Court, not the district court, should determine its own jurisdiction" first. It was the Agencies, however, that chose to present the jurisdictional issue to the district court and not to this Court. Protective petitions for review of NHTSA's action have been pending in this Court since September 2019. *See* PIP Mot. at 9 n.2. The Agencies or CSAR could have moved that this Court determine its own jurisdiction long ago, and then moved to extend their time to respond to the district-court complaints pending this Court's jurisdictional ruling. *Cf.* U.S. Mot. to Extend Deadline to Respond, *California v. Chao*, D.D.C. No. 1:19-cv-02826-KBJ (Jan. 13, 2020) (moving to extend NHTSA's deadline to respond to a later-filed complaint and complaint-in-intervention pending *the district court's* jurisdictional ruling). Having opted instead to present the issue to the district court in "fully briefed and pending" motions, *id.* at 2, without asking that court to expedite its review, the Agencies and CSAR cannot complain if this Court decides to await that review before considering the issue itself.[1]

II. The Balance of Hardships Favors Abeyance.

Holding these petitions in abeyance pending the conclusion of (or entry of an appealable order in) the district-court proceeding would cause no meaningful hardship

[1] If this Court is disinclined to await even the district court's disposition of the jurisdictional issue, the Court should (1) direct the parties to fully brief that issue now in this Court and (2) resolve that issue before deciding whether and when to order full briefing on the merits in this complex proceeding.

to the Agencies or CSAR. *See* PIP Mot. at 16–17. The Agencies (Opp. at 13) and CSAR (Opp. at 16–20) contend that delayed resolution of these petitions will harm CSAR's members, repeating the meritless arguments made in support of their motions to expedite. Public-Interest Petitioners have rebutted those arguments already and will not do so again. *See* Public-Interest Petrs. Opp. to Mots. to Expedite at 9–14.[2] In any event, as explained above, the abeyance that Public-Interest Petitioners seek is unlikely to delay the ultimate resolution of these petitions at all, because the district court alone has original jurisdiction to review the foundational agency action at issue here.

CONCLUSION

The motion for abeyance should be granted.

Respectfully submitted,

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[2] This Court should not consider any new argument or evidence relating to hardship that may accompany the Agencies' and CSAR's reply briefs in support of their motions to expedite consideration. *See, e.g.*, *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (noting that such submissions generally are not considered).

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Dated: January 17, 2020

CERTIFICATE OF COMPLIANCE

The foregoing reply in support of a motion contains 2,579 words and complies with the type-volume limit in Fed. R. App. P. 27(d)(2)(C). The document was prepared using Microsoft Word 365 in 14-point, Garamond font, and it complies with the type-face and typestyle requirements of Fed. R. App. P. 27(d)(1)(E).

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CERTIFICATE OF SERVICE

On January 17, 2020, I filed the foregoing document with this Court using the CM/ECF system. All parties in these consolidated cases are represented by counsel that are registered CM/ECF users and will be served via the CM/ECF system.

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